

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PHILLIP W. HAYWOOD

Claimant

VS.

CESSNA AIRCRAFT COMPANY

Respondent

AND

KEMPER INSURANCE COMPANIES

Insurance Carrier

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Docket Nos. 211,627
& 231,153

ORDER

Claimant and respondent appeal the Award of Administrative Law Judge Nelsonna Potts Barnes dated December 7, 2000. Claimant was granted a 41 percent permanent partial disability to the body as a whole on a functional basis for accidental injuries sustained in August 1995 and continuing each and every day thereafter through March 30, 1998, and on May 29, 1997 through March 30, 1998. Respondent alleges that the claimant's injuries and limitations should be restricted to the upper extremities only and not include the back. Claimant alleges his disability is permanent and total in character, including both the upper extremities and the back. Oral argument before the Board was held on May 16, 2001.

APPEARANCES

Claimant appeared by his attorney, Andrew L. Oswald of Hutchinson, Kansas. Respondent and its insurance carrier appeared by their attorney, Kirby A. Vernon of Wichita, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations contained in the Award. Additionally, the record includes the preliminary hearing held November 18, 1997. The medical exhibits from that preliminary hearing, however, were not considered by the Board.

ISSUES

What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant, a 21-year employee with respondent, began developing upper extremity problems in 1995. Claimant operated a hydropress machine, which was described as a metal forming machine. Claimant had been working on this machine for about five years. Prior to June 1995, claimant had experienced no problems performing his job tasks. However, in June 1995, he began experiencing problems in his left elbow, including pain and swelling. He also developed difficulties with his grip. He was referred to Larry Wilkinson, M.D., a company doctor, who diagnosed tennis elbow and returned claimant to work with restrictions. Claimant provided those restrictions to John Bailey, his foreman, and was taken off the hydropress machine and put on a different machine. Claimant began developing additional problems in both his left and right upper extremities and was then referred to orthopedic surgeon J. Mark Melhorn, M.D.

Claimant first saw Dr. Melhorn in October 1995, and was diagnosed with bilateral tennis elbow and pinched nerves. He continued working in the accommodated position. However, the problems in his upper extremities grew worse, his elbows were swollen and he began losing strength in both hands. He developed a propensity to drop things. Claimant was restricted to working 40 hours a week rather than the 48 to 50 hours he had originally been working. By May 1996, claimant's problems had spread into his hands and wrists, and he was diagnosed with mild bilateral carpal tunnel syndrome. Claimant was then restricted from lifting over 20 pounds overhead. He continued working in a modified accommodated job.

Claimant was referred to Dr. Hearon in May 1996. He restricted claimant to 25 pounds lifting with no repetitive or overhead lifting. Claimant began developing additional problems, including swelling in his shoulders and headaches.

At about this time, claimant began having problems with a foreman named Matt Boily. Apparently, Mr. Boily kept encouraging claimant to work outside of his restrictions, not believing claimant was actually injured. A dispute arose and claimant was terminated on June 19, 1996. Claimant filed a grievance through the union and approximately nine months later, after a series of hearings, was returned to work and reinstated in his position with respondent. Claimant underwent left hand carpal tunnel surgery by Dr. Hearon in December 1996, and right side carpal tunnel surgery in April 1997. On May 29, 1997,

claimant was referred to work hardening. During his first day of work hardening, claimant was asked to squat with a bar. While doing so, he felt something pull in his back and he lost his balance and fell against the wall. Claimant's back worsened as he continued working. He began experiencing pain down both legs and swelling in his back. Approximately a week after finishing work hardening, claimant underwent an MRI which displayed a narrowing of the bones around the L5 level which Dr. Wilkinson stated was causing pressure on nerves in claimant's back. Claimant also had two other bulging discs.

Initially, claimant was not provided an accommodated position for his back but, in February 1998, he was offered and did accept a job identified as "the burr bench."

It was soon determined that the burr bench position exceeded claimant's restrictions, and claimant was offered a second position involving painting and prepping work. Claimant testified that job was still outside of his restrictions, as he had to hold onto and blow out air lines. Additionally, claimant had difficulty painting engines, as they were heavy and he could not lift them. Plus, he had difficulty holding the paint gun. The only job the claimant could perform within his restrictions involved loading and unloading parts on a conveyor. Claimant originally was told that there would be five jobs in that area that he could rotate to. That, however, proved not to be the case.

Claimant was referred to Philip R. Mills, M.D., a board certified physical medicine and rehabilitation specialist, who when provided a description of this job felt it was appropriate for claimant so long as rotation was involved. However, claimant testified that, after working there for approximately a month and a half, he realized that there was no job rotation and he was simply stuck on the conveyor belt, picking up parts. Claimant testified that the work on the parts conveyor belt was causing him difficulties as he was having to work over 18 inches away from his body at an uncomfortable level.

Shelby Tucker, claimant's production foreman, testified that the belt claimant worked at was a graduated-level belt and claimant was free to work at any position next to the belt and at any level he felt comfortable. So claimant's objection to the height of the belt, in Mr. Tucker's mind, made no sense. Mr. Tucker also testified that he attempted to accommodate claimant in any way possible, offering him a variety of jobs and telling him that he was free to move back and forth between the masking, plugging and line loading positions whenever he felt uncomfortable. Mr. Tucker testified that job rotation was available to claimant, contrary to claimant's allegations.

Even doing the light duty jobs, claimant noticed his hands and elbows were swelling and he was having difficulty with his back, including pain down both legs. He could not stand or sit for very long. Claimant checked with his family physician and was advised to discontinue working. Claimant last worked in March 1998. Claimant applied for and was awarded social security disability benefits beginning August 1998. He applied for and was granted a disability retirement from respondent in January 1999.

Claimant was first referred to Dr. Mills by claimant's attorney in July 1997. Dr. Mills diagnosed claimant with bilateral tennis elbow, post carpal tunnel releases bilaterally, a remote back injury with recent exacerbation, early decreased range of motion bilaterally in the shoulders with unclear etiology, fibromyalgia and depression. Dr. Mills felt that the epicondylitis in claimant's elbows and the carpal tunnel syndrome were related to claimant's employment with respondent. However, he offered no opinion regarding the cause of the fibromyalgia.

Dr. Mills was provided two videotapes showing the deburring job claimant had performed, which he opined claimant could not do within his restrictions. The second videotape included the unloading of parts on a conveyor belt and the task rotation jobs which Dr. Mills opined claimant could perform. He stated that it was important for claimant to have task rotation in order to avoid future upper extremity difficulties. Without task rotation, claimant would be unable to perform the same hand-intensive activities without suffering an aggravation.

Dr. Mills opined claimant had a 14 percent impairment to the body as a whole for both the epicondylitis and carpal tunnel syndrome. He testified that those conditions were causally related to his employment with respondent. Dr. Mills did not, however, rate claimant's back condition.

Dr. Mills identified claimant's back injury as a remote back injury with recent exacerbation. He referred to a car accident claimant had suffered approximately 25 years before when he originally injured his back. Claimant, however, testified that he recovered from that back injury and, in fact, passed a preemployment physical before beginning work with respondent.

Dr. Mills testified that it was possible that claimant's back condition had suffered a change as a result of the work hardening injury. He considered any aggravation of the preexisting back problems from work hardening to be speculation, but he gave no contrary explanations for claimant's new symptoms.

Dr. Mills further stated that claimant was unable to return to his original position with respondent, not only because of his upper extremity complaints, but also because of his back complaints.

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D. Dr. Murati saw claimant in September 1999 and was provided with medical records prior to the time of the examination.

Dr. Murati's report was confusing in that it indicated claimant had injured his back in a motor vehicle accident on his way to therapy. Claimant provided him a letter indicating

that this was an error and that the injury actually occurred during the work hardening program itself.

Dr. Murati ultimately diagnosed bilateral shoulder pain with loss of range of motion, bilateral epicondylitis, lumbosacral strain with loss of range of motion, fibromyalgia, bilateral carpal tunnel syndrome and bilateral ulnar cubital tunnel syndrome.

Dr. Murati restricted claimant from heavy grasping, limiting him to occasional bending, climbing stairs, climbing ladders, squatting, crawling and repetitive grasping. He allowed frequent sitting, standing, walking, driving and repetitive hand controls, but restricted claimant from working more than 18 inches from his body. He further recommended claimant use a lumbar support while doing any lifting. Claimant was also restricted from the use of hooks, knives and vibratory tools.

Based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, Dr. Murati found claimant to have a 17 percent whole person impairment to the right upper extremity for the carpal tunnel, cubital tunnel, range of motion loss and crepitus difficulties in his upper extremity on the right side. Dr. Murati further testified that claimant had a 17 percent impairment to the left upper extremity, diagnosing the same conditions.

Dr. Murati went on to state claimant had a 5 percent impairment for the lumbosacral strain and a 10 percent whole person impairment for loss of range of motion in the lumbar spine. Using the AMA Guides combined values chart, Dr. Murati opined claimant had suffered a combined 41 percent functional impairment to the body as a whole for the injuries suffered while working for respondent.

Dr. Murati was also provided a videotape of the burr bench job and the paint helper job, both of which Dr. Murati stated would be outside of the restrictions he placed on claimant.

Claimant testified that, following his last day worked with Cessna of March 30, 1998, he did not apply for any other positions with any other employers. He did not actually quit his job with respondent. It simply was outside of his restrictions. He was advised by Dr. Mills that there was nothing more that could be done and claimant should move on and find a different job. Claimant testified that he continued to have fatigue in this back with pain down his legs, and his arms continued to swell. He further stated at regular hearing that his hands were getting worse and his grip strength was weaker. At the time of the regular hearing, claimant had not applied for any additional work with any other employer and was living on his social security disability benefit and disability pension from respondent.

In workers compensation litigation, it is claimant's burden of proof to establish his right to an award of compensation by proving the various conditions upon which that right

depends by a preponderance of the credible evidence. K.S.A. 1997 Supp. 44-501 and K.S.A. 1997 Supp. 44-508(g).

K.S.A. 1997 Supp. 44-510e(a) defines functional impairment as:

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

Both Dr. Murati and Dr. Mills rated claimant's upper extremity conditions, with Dr. Mills finding claimant had a 14 percent impairment to the body as a whole, while Dr. Murati found claimant to have suffered a 17 percent whole person impairment to each upper extremity, which converts to a 31 percent impairment combined. The Appeals Board finds no justification for giving greater credibility to one doctor's opinion over the other and, therefore, finds claimant has suffered a 22.5 percent impairment to the body as a whole for the upper extremity conditions. Dr. Murati is the only physician to express an opinion on the functional impairment to claimant's low back, opining that claimant had a 5 percent impairment for lumbosacral strain and a 10 percent impairment for loss of range of motion in the lumbar spine which, when combined, computes to a 15 percent impairment to the body as a whole. Combining both the upper extremity and lumbar spine impairments, the Appeals Board finds claimant has suffered a functional impairment of 34.5 percent to the body as a whole from the injuries suffered while employed with respondent.

Claimant contends that he is permanently and totally disabled as a result of the injuries suffered with respondent. However, both Dr. Mills and Dr. Murati, while severely restricting claimant, do not find claimant to be totally incapable of engaging in any type of substantial and gainful employment. See K.S.A. 44-510c (Furse 1993); see also Grounds v. Triple J Construction Co., Inc., 4 Kan. App. 2d 325, 606 P.2d 484, *rev. denied* 227 Kan. 927 (1980).

The Appeals Board, therefore, finds claimant has failed to prove that he is permanent totally disabled as a result of the injuries suffered with respondent.

K.S.A. 1997 Supp. 44-510e defines permanent partial disability compensation as:

. . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after

the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

Both Dr. Murati and Dr. Mills were asked to review the task list created by vocational expert Jerry Hardin. Both agreed that, as a result, claimant had suffered a task loss of 81 percent based upon Mr. Hardin's report.

The Appeals Board, however, must also consider respondent's contention that claimant has not made a good faith effort to find work after his employment with respondent ceased. While the Appeals Board does not find that claimant's determination to leave respondent was not done in good faith, the Appeals Board does find that claimant's total lack of effort to find employment after leaving respondent does not constitute good faith. See Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

The record, unfortunately, is void of any evidence as to claimant's ability to earn wages. Additionally, the report of Jerry Hardin casts no insight on claimant's ability to earn wages. Mr. Hardin found claimant to have a wage loss of 100 percent due to the fact claimant was earning no wages.

As there is no evidence in the record of claimant's ability to earn wages, the Appeals Board adopts the federal minimum wage of \$5.15 per hour, equating to a weekly wage of \$206 per week based upon a 40-hour week. When compared to claimant's agreed average weekly wage of \$905.92, this computes to a wage loss of 77 percent.

As K.S.A. 1997 Supp. 44-510e requires equal consideration of both claimant's 81 percent loss of task performing ability and claimant's 77 percent wage loss, the Board finds claimant has suffered a work disability of 79 percent for the injuries occurring with respondent to both his upper extremities and his low back.

The Appeals Board, therefore, finds that the Award of Administrative Law Judge Nelsonna Potts Barnes should be modified to award claimant a permanent partial work disability of 79 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that an award is granted in favor of the claimant, Phillip W. Haywood, and against the respondent, Cessna Aircraft Company, and its insurance carrier, Kemper Insurance Companies, for injuries occurring through March 30, 1998, claimant's last day at work, based upon an

average weekly wage of \$905.92, for a 79 percent permanent partial disability to the body as a whole.

Claimant is awarded 18.14 weeks of temporary total disability compensation at the rate of \$351 per week totaling \$6,367.14, followed thereafter by 266.76 weeks permanent partial disability compensation at the rate of \$351 per week in the amount of \$93,632.86, for a total award not to exceed \$100,000.

As of August 10, 2001, claimant is entitled to 18.14 weeks of temporary total disability compensation at the rate of \$351 per week totaling \$6,367.14, followed by 157.43 weeks permanent partial disability compensation at the rate of \$351 per week totaling \$55,257.93, for a total due and owing of \$61,625.07, minus any amounts previously paid. Thereafter, claimant is entitled to 109.33 weeks permanent partial disability compensation at the rate of \$351 per week totaling \$38,374.93 until fully paid or until further order of the Director.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of September, 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Andrew L. Oswald, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director